Court of Appeals No. 56938-8-II
PCHB Case No. 19-087c

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION II

ADVOCATES FOR A CLEANER TACOMA, SIERRA CLUB, WASHINGTON ENVIRONMENTAL COUNCIL, WASHNGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY, AND STAND.EARTH,

Appellants,

v.

PUGET SOUND CLEAN AIR AGENCY; PUGET SOUND ENERGY,

Respondents.

PUGET SOUND ENERGY, INC.'S RESPONSE TO AMICUS BRIEF

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I. INTRODUCTION

The Attorney General ("Amicus") challenges the reasonableness of Puget Sound Clean Air Agency's ("PSCAA") Supplemental Environmental Impact Statement ("SEIS") for Tacoma Liquified Natural Gas ("TLNG") on grounds the SEIS should have disclosed the "speculative" nature of three of its assumptions. The Amicus's argument, which is not entitled to any weight or deference, depends entirely on flawed legal theories and inapposite case law. Additionally, Amicus's arguments are divorced from the facts in the case. Amicus selectively and egregiously ignores passages of the SEIS that directly disclose uncertainty in its assumptions. Amicus also fails to acknowledge that the SEIS avoided uncertainties by refraining from engaging in the rampant speculation that Appellants and Amicus argue was required. The Pollution Control Hearings Board ("PCHB"), whose decision is entitled to deference, correctly concluded the SEIS's assumptions and disclosures were reasonable. Amicus's arguments fail.

II. STANDARD OF REVIEW

This brief incorporates the Standard of Review from PSE's Response to Appellants' Opening Briefs. Amicus largely ignores the many deferential standards under which this Court must review the adequacy of the SEIS. Generally, the adequacy of an EIS is reviewed under the "rule of reason," a "broad, flexible cost-effectiveness standard" that requires that the EIS provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the agency's decision. *Citizens All. to Protect Our Wetlands v. City of Auburn* ("*CAPOW*"), 126 Wn.2d 356, 362, 894 P.2d 1300 (1995) (internal quotation marks and citations omitted); *Klickitat Cnty. Citizens Against Imported Waste v. Klickitat Cnty.*, 122 Wn.2d 619, 633, 860 P.2d 390 (1993) (quoting *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 344-45, 552 P.2d 184 (1976)); *see also King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 183, 979 P.2d 374 (1999), *appeal after remand sub nom. Quadrant Corp. v. State Growth Mgmt.*

Hearings Bd., 119 Wn. App. 562 (2003), *aff'd in part and rev'd in part*, 152 Wn.2d 1012 (2005). When a project's impacts are disclosed at a general level of detail, the rule is satisfied. *See CAPOW*, 126 Wn.2d at 368-69 (rejecting challenge to traffic analysis as "one of detail" that "does not survive the rule of reason."). *See also Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cnty.*, 96 Wn.2d 201, 208, 634 P.2d 853 (1981) (upholding the adequacy of an EIS the Court described as "bare bones").

In an EIS adequacy appeal, the reviewing body does "not rule on the wisdom of the proposed development but rather on whether" the SEIS provided "sufficient information to make a reasoned decision." *CAPOW*, 126 Wn.2d at 362.

Moreover, to prevail in their appeal, an opponent, like Amicus or Appellants, must establish that the SEIS's analysis is unreasonable. *Org. to Pres. Agric. Lands v. Adams Cnty.*, 128 Wn.2d 869, 881, 913 P.2d 793 (1996) (affirming adequacy of EIS where appellant's expert witness "did not testify definitively

that studies [were] inadequate"). The reasonableness standard inherently accommodates a variety of potential approaches, precisely because the EIS "is not a compendium of every conceivable effect or alternative to a proposed project, but is simply an aid to the decision-making process." *Toandos Peninsula Ass'n v. Jefferson Cnty.*, 32 Wn. App. 473, 483, 648 P.2d 448 (1982). Hence, the deferential "rule of reason" that governs EIS adequacy allows the agency to choose from a range of different, reasonable approaches and, when an agency is presented with different expert opinions, "it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences." *City of Des Moines v. Puget Sound Reg'l Council*, 108 Wn. App. 836, 852, 988 P.2d 27 (1999), *review denied*, 140 Wn.2d 1027 (2000) (citation omitted). Amicus and Appellants must do more than simply provide other reasonable approaches or conflicting opinions. *Id.*; *see also Solid Waste Alt. Proponents v. Okanogan Cnty.*, 66 Wn. App. 439, 447-48, 832 P.2d 503 (1992) (rejecting arguments that groundwater analysis in an EIS

was inadequate on the basis of comparison to EISs of similar proposals in other counties). Rather, they must establish that the SEIS's analysis is unreasonable.

Finally, as an agency with specialized expertise in air permitting, PSCAA's determinations are entitled to "substantial weight." *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000), *review denied*, 144 Wn.2d 1005 (2001).

III. STATEMENT OF THE CASE

This brief incorporates the Statement of the Case from PSE's Response to Appellants' Opening Briefs. Of particular relevance to the Amicus Brief are PSCAA's conclusions related to significance and the assumptions utilized in its modeling relevant to its conclusion. PSCAA determined that TLNG is expected to result in a net decrease of greenhouse gas ("GHG") emissions as compared to the "no action" alternative, but that due to the highly technical GHG modelling and depending on the assumptions employed, the Project could potentially result in a

marginal increase in GHG emissions. AR7819, 15645-46. In either circumstance, the Agency concluded that the emissions impacts would not be "significant" for purposes of the State Environmental Policy Act ("SEPA"). AR7819. Importantly, the Agency was fully informed of the range of potential GHG impacts and factored that into their decision, which is what SEPA requires.

IV. ARGUMENT

A. Amicus's Legal Arguments Are Not Entitled to Deference.

As indicated in PSE's Answer Brief, both PCHB and PSCAA are entitled to deference in this proceeding. By contrast, Amicus is not. Amicus is the Attorney General, in his elected capacity. As such, in this case Amicus is not representing any of the state agencies to which this Court might otherwise extend deference on technical matters or environmental statutes. In particular, despite Amicus's repeated comparisons to a project in which the Washington State Department of Ecology ("Ecology") was the SEPA lead agency, Amicus does not represent Ecology

and does not speak on its behalf. To the contrary, Ecology already commented on TLNG's SEIS and PSCAA responded to those comments,[1] none of which raised any of the issues Amicus advances in its brief.

This especially matters when weighing the credibility of Amicus's arguments, because Amicus makes several false legal assertions. As indicated below, Amicus's arguments regarding "uncertainty" are contrary to case law and inconsistent with the text of the regulations Amicus cites. Amicus also incorrectly claims that SEPA categorically requires lead agencies reviewing "projects involving transportation, storage, or use of fossil fuels" to consider "the lifecycle impacts" of producing, transporting, and using those fuels. Amicus Br. at 8. Because PSCAA conducted a lifecycle analysis, whether SEPA mandates one is not at issue. Nevertheless, Amicus's assertion is a glaring overreach that seeks to have this Court impose a categorial rule

[1] AR5482-83, 22415-16, 22420-23, 22426-27.

not contained in any statute or regulation. The extent of SEPA review is determined on a case-by-case basis. WAC 197-11-060(2)(a) (the content of environmental review depends "on each particular proposal"). While a lead agency may decide a complete lifecycle analysis is necessary for a specific project (as was the case here), SEPA does not categorically require that outcome, as Amicus asserts.

None of the authority Amicus cites supports its irrelevant legal assertion. The non-binding decision of the Shorelines Hearings Board to which Amicus cites involved a lifecycle analysis for a specific project, but did not interpret SEPA as requiring that analysis categorically. *See Columbia Riverkeeper v. Cowlitz Cnty.*, No. 17-010c, 2017 WL 10573749 (Shoreline Hearings Bd. Sept. 15, 2017). Similarly, WAC 197-11-060(4)(c), on which Amicus also relies, requires agencies to consider a project's "probable impacts" over the project's "lifetime" and does not require a "lifecycle analysis" for every project, as Amicus claims. Amicus Br. at 8. The former refers to the

duration of the impacts associated with a project, while the latter refers to the specific GHG analysis of emissions from the complete supply chain, including emissions from upstream and downstream of the project. Amicus disingenuously conflates the two concepts and suggests the regulation requires categorical lifecycle analyses for every project. It does not.

Amicus advances its irrelevant and incorrect legal assertion to advance its own policy objectives and invites this Court to impose a legal requirement that does not currently exist. Indeed, Ecology has recently pursued (and more recently abandoned) development of a rule that would create the obligation Amicus invites this court to impose. *See* AR15694 (discussing history of Ecology's proposed GAP Rule). Because PSCAA conducted a lifecycle analysis, the legal principle is irrelevant in this case. However, Amicus's thinly veiled efforts to use this case to promote its own policy objectives suggests its positions are not credible and should be given no weight.

B. The Amicus Misstates the Regulation that Is the Basis of Its Argument.

The Amicus states that because a specific SEPA regulation requires agencies to "disclose 'scientific uncertainty concerning significant impacts,'" the SEIS was also required to disclose "uncertainties" about all of its underlying assumptions. AB 9, 10, 12, 14 (citing WAC 197-11-080).[2] Amicus's arguments fail because the Agency adequately disclosed uncertainties about its assumptions and methodologies where they existed or otherwise avoided uncertainties by refraining from the very speculation Appellants argue was required.

More generally, however, the basic legal argument on which Amicus relies lacks any legal support. Without any

[2] The other regulation to which Amicus cites has nothing to do with its arguments about disclosure of uncertainty. WAC 197-11-330(3)(d) simply acknowledges the unremarkable proposition that "it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified." It does not create any obligation to disclosure of uncertainty. Moreover, it applies to the threshold determination process, which, as explained in PSE's Answer Brief ("PSE Br."), is irrelevant to this case. PSE Br. at Section IV.A.1.

authority or argument, Amicus asks this court to extend the scope of the regulation on which Amicus's entire argument rests from disclosure of uncertainty regarding "significant impacts" to a much broader disclosure of uncertainty regarding any of the underlying methodologies and assumptions used in an EIS.[3] There is no authority for that sweeping expansion. No cases address the operative effect of this regulation. No cases have deemed an EIS inadequate for failing to disclose uncertainty in assumptions or methodologies. The Court should reject Amicus's unsupported expansion of a regulation that is inconsistent with the text of the regulation itself.

[3] In this instance, the SEIS concluded GHG emissions would *not* be significant, rendering WAC 197-11-080 inapplicable on its face. Regardless, as explained in PSE's Response Brief at Section IV.A.1, the question of whether the SEIS labels an impact as "significant" is irrelevant to the underlying claims that the analysis in the SEIS is inadequate. Accordingly, the regulation here, to the extent it addresses uncertainties in the same legal conclusion is irrelevant to the adequacy of the analysis.

C. In Any Event, the SEIS Adequately Disclosed Uncertainty in the Assumptions Used to Calculate Emissions.

Importantly, the SEIS satisfies even Amicus's sweeping interpretation of the regulation by clearly and thoroughly disclosing relevant uncertainty in the underlying assumptions that formed the basis of its analysis of TLNG's GHG emissions.

In the discussion of GHG emissions, the SEIS explains the range of uncertainty in the background assumptions and the resulting values. AR7845-48. It acknowledges that the lifecycle analysis is highly dependent on the "various assumptions" employed and documents all the assumptions used in Appendix B. AR7846. Recognizing that the analysis depended on "assumptions made in the GHG emission life-cycle analysis which could affect the calculation and results of the analysis," PSCAA prepared a sensitivity analysis that it expanded in response to comments. *Id.* While the sensitivity analysis was included in an appendix, the body of the SEIS includes a summary of the results and conclusions drawn from it:

> The DSEIS included a sensitivity analysis that illustrated some of the variable assumptions used in the analysis and how a change in each assumption could affect the final results. In the responses to comments (see Appendix C), additional variables were evaluated and the expanded sensitivity analysis is included in Appendix B (see Section 5 of Appendix B). The expanded sensitivity analysis was similar to the original information provided with the DSEIS. It included variable assumptions that would both increase and/or decrease the GHG emissions included in the life-cycle analysis. Each of these variables are independent of each other and could equally affect the final comparison (up or down). However, the changes each variable could produce are relatively small compared to the GHG emission totals included in the life-cycle analysis.

AR7846.

Finally, the SEIS tied this uncertainty from the variability of the input assumptions to its conclusion regarding GHG emission impacts:

> As discussed in the life-cycle analyses (Appendix B of this SEIS) and in the Summary of Impacts (Section 4.5), an evaluation of the model input variables to complete the analysis shows a range of effects that either increase or decrease the difference in GHG emission in this comparison. These variables could individually affect the difference in GHG emissions in the approximate range of a reduction of 45,000 to an increase of 55,000 tonnes of CO2e per year (using the Scenario

> B – 500,000 gallons per day of LNG production). These variable emission scenarios are small in comparison to the total life-cycle GHG emission estimate for Scenario B of 1,366,115 tonnes of CO2e per year…
>
> [I]f the different assumptions in the life-cycle analysis were to change the final comparative amounts of emissions (e.g., to go from a small decrease to a small increase in GHG emissions as described in the previous paragraph), the small increase in GHG emissions, between the Proposed Action in comparison to the No Action Alternative, would still not be considered a significant adverse impact because the increase would be small compared to the total GHG emission identified in the life-cycle analysis.

AR7848-49.

Amicus fails entirely to acknowledge this thorough disclosure of uncertainty resulting from the variability of the assumptions used in the analysis. Amicus, like ACT, may disagree with the conclusion that the impacts are less than significant, even with that variability (a conclusion that is governed by a deferential clearly erroneous standard and is not relevant to the question of EIS adequacy). PSE Br. at Section IV.A.2. In any event, the sole focus of Amicus's argument is

related to the disclosure of uncertainty. As a matter of fact and law, the SEIS adequately disclosed uncertainty.

D. The SEIS Specifically Disclosed the Uncertainty and Variability in Assumptions Regarding Upstream Methane Leak Rates.

For the same reasons, Amicus's arguments regarding disclosure of uncertainty specific to the assumptions of methane leak rates also fails. The SEIS specifically notes that the assumption of the source of gas from British Columbia is a "key assumption" and highly variable. AR7846. It quantifies the range of that particular assumption, noting in the text of the SEIS itself the rate from the *Alvarez* study that Amicus and ACT preferred:

> One key assumption is that the source of the gas that supplies the plant is identified by PSE as being exclusively sourced from British Columbia or Alberta, but entering Washington through British Columbia. The life-cycle analysis report indicates that GHG emission factors for natural gas production in the United States may be as much as five times higher than those for Canada. Additional recent research has indicated that the actual realized fugitive emissions from natural gas production in the United States appear to be 60 percent higher than published fugitive emission factors (Alvarez et

> al. 2018). The net effect of these higher emission rates, if realized as part of the Proposed Action, would be an increase in GHG emissions through the life-cycle analysis rather than the decreases shown in Table 4-5. Thus, the source of the natural gas is an important factor to this analysis and its conclusions.

AR7846.

Amicus ignores this text in which the SEIS expressly acknowledges the variability and uncertainty in this "key assumption" and how it could result in higher emission rates (that are quantified and shown on an accompanying Table[4]). Amicus's decision to selectively ignore the pertinent parts of the SEIS are an egregious and fatal omission. The SEIS clearly disclosed the specific uncertainty regarding this assumption.

Moreover, Amicus perpetuates the same falsehood advanced by ACT. Both assert that the SEIS utilized a single methane leak rate that stems from a "single study" on methane leak rates. The SEIS actually cited 12 studies (not just one) with leakage rates ranging from 0.32% to 2.3%. AR27110-11, 7969.

[4] AR7846.

To the extent that it included and assessed the lower range, it was reasonable to do so. Three of the included rates were specific to British Columbia, from which TLNG will receive its natural gas, including the study from which the 0.32% rate was taken. AR27110-11. PSE Expert Patrick Couch testified that regionally specific analyses are more precise and estimates from one region cannot be extrapolated to another. AR27111; Tr. 731:24-732:14. It was therefore reasonable, and more accurate, to use the British Columbia studies for methane leakage rates. AR27112; Tr. 732:24-733:2. Regardless, the SEIS included a full range and disclosed clearly the uncertainty created by that range, quantifying the differences in the impacts that might result on the basis of the value used for that single assumption.

Amicus takes issue with the inclusion of these various ranges in an appendix, but selectively ignores that the conclusions of that robust analysis were summarized in the text of the SEIS itself. Regardless, the use of technical appendices was proper and consistent with SEPA. SEPA requires succinct

"readable reports" written in plain language without being "excessively detailed or overly technical." WAC 197-11-425(1), (2), (3). SEPA specifically provides that detailed descriptions "may be included in appendices or supporting documents" and instructs agencies to "incorporate material into an environmental impact statement by reference to cut down on bulk," if possible. WAC 197-11-425(6). The record squarely rebuts the Amicus's contention that the SEIS failed to disclose information on a range of methane leak rates.

Finally, the Court should reject Amicus's flawed comparison to Ecology's 2020 SEPA review of the Kalama Manufacturing and Marine Export Facility. As a basic principle under the "rule of reason," the mere existence of a different methodology or approach is insufficient to prove that an approach used in an EIS is unreasonable. *See, e.g., Solid Waste,* 66 Wn. App. 439 (rejecting arguments that groundwater analysis in EIS was inadequate on the basis of comparison to EISs of similar proposals in other counties); *W. 514, Inc. v. Cnty. of*

Spokane, 53 Wn. App. 838, 842, 846-47, 770 P.2d 1065, *review denied*, 113 Wn.2d 1005 (1989) (general allegations of project's potential adverse impact insufficient when petitioner "did not establish the probability or likelihood of" the alleged adverse impact); *City of Des Moines*, 98 Wn. App. at 35-36. It "is within an agency's discretion to determine which testing methods are most appropriate." *Seattle Cmty. Council Fed'n v. Fed. Aviation Admin.*, 961 F.2d 829, 834 (9th Cir. 1992) (citations omitted).

More generally, the comparison is flawed. Both documents used a comparable range of emission estimates: PSCAA's SEIS used a range between 0.32% to 2.3%, while Amicus suggests Ecology used a range "from 0.32 to 2.3 percent." Amicus Br. at 12. While Ecology eventually increased the high end of the range to 3%, that approach, in the context of that project, is insufficient to suggest PSCAA's approach and disclosure were unreasonable. In Kalama, Ecology assumed some natural gas could be sourced from the United States where rates can "be as much as five times higher than those for

Canada." AR7846. In this case, by contrast, PSCAA imposed a condition that precludes that outcome and requires all gas to be sourced from British Columbia and Alberta. It is not enough to simply show, as Amicus does, that Ecology's presentation of information in Kalama varied from PSCAA's presentation of information in the TLNG SEIS. Washington courts flatly reject such "flyspeck[ing]," *Mentor v. Kitsap Cnty.*, 22 Wn. App. 285, 290, 588 P.2d 1226 (1978), because an EIS is "simply an aid to the decision making process," not "a compendium of every conceivable effect or alternative to a proposed project." *Concerned Taxpayers Opposed to Modified Mid-S. Sequim Bypass v. Wash. State Dep't of Transp.*, 90 Wn. App. 225, 230, 951 P.2d 812 (1998); *Toandos Peninsula Ass'n*, 32 Wn. App. at 483. Preferences for different formats or presentation styles fails to satisfy the burden of proving the SEIS was unreasonable. Finally, it is important to note significant project differences that are relevant to determining the proper extent of environmental review and assumptions used. The Kalama project Ecology

reviewed is a project remarkably different in size and purpose. TLNG is 1/13th the size of Kalama and, contrary to the Kalama project, is not an export facility. The Amicus's comparison is flawed and the approach Ecology used for the Kalama SEPA review does not dictate an outcome or define what is reasonable for PSCAA's review of TLNG.

E. Economic-based "Induced Impacts" on Supply and Demand Do Not Create Uncertainty or Otherwise Prove the 1:1 Displacement Ratio Was Unreasonable.

As a preliminary matter, the Court should disregard Amicus's arguments related to the 1:1 displacement ratio and purported "induced impacts" based on principles of supply and demand. Neither ACT nor the Tribe has raised this issue. Amicus's argument pertains to a portion of PCHB's decision, AR15661-66, that was not challenged in either of the Appellants' briefs and is therefore abandoned. An amicus cannot advance issues that appellants have abandoned. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 749 n.12, 218 P.3d 196 (2009); *Walker v. Wiley*, 177 Wn. 483, 491, 32 P.2d 1062 (1934)

(arguments not raised in party's opening brief are abandoned and may not be argued by amici curiae).

In any event, Amicus's arguments fail. Amicus argues that the 1:1 displacement is flawed because it fails to address induced impacts related to supply and demand of LNG as compared to MGO. Specifically, and without citation to any authority or evidence in the record, Amicus argues that the SEIS should have considered the fact that the "availability of LNG as a fuel may generate some demand for it from sources other than current marine gas oil users . . ." and that "some new customers for marine gas oil may arise to use the newly unpurchased and available supply . . .." Amicus Br. at 16.

The lack of any record citation to address this topic is glaring. In fact, PCHB properly rejected this argument. The evidence established that a 1:1 displacement assumption was both reasonable and standard practice. PCHB relied on the testimony of Mr. Unnasch and Mr. Couch, who have each worked on dozens of LCAs and testified that the induced effects

advanced by Appellants are not typically considered in LCAs. AR15642, 15644, 15650, 15662, 15664-65. Moreover, PCHB relied on the testimony of Mr. Unnasch and Dr. Levy, an economist, that the induced effects advanced by appellants would not impact the analysis at all. AR15663-64, 15665. By contrast, PCHB concluded that appellants' witness was not compelling or persuasive:

> The Board finds and concludes that Dr. Layton's opinion regarding supply and demand elasticities was theoretical in nature, was not specific to TLNG markets, and this type of economic analysis was not typically applied to fuel LCAs. Moreover, Dr. Layton did not have any expertise conducting an LCA. Accordingly, the Board gives more weight to Dr. Levy, Unnasch and Couch's credible testimony supporting the reasonableness of the 1-for-1 displacement assumption in the LCA.

AR15665-66.

On the basis of that testimony, PCHB ultimately concluded that "PSCAA's use of a 1-for-1 displacement assumption meets the rule of reason." AR15666. The Board's credibility determinations of witness testimony are beyond

review in this appeal. Amicus's arguments also ignore the weight of the record.

PCHB's decision is well grounded in law. The Board concluded that the concerns regarding induced economic impacts were "theoretical in nature." AR15665. SEPA does not require an Agency to speculate on hypothetical uncertainties. "Impacts or alternatives which have insufficient causal relationship, likelihood, or reliability to influence decisionmakers are 'remote' or 'speculative' and may be excluded from an EIS." *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494, 509, 306 P.3d 1031 (2013) (citation omitted). PSCAA's task was to analyze TLNG's impacts against existing, not theoretical, uses or conditions. *Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 869, 502 P.3d 359 (2022).

For similar reasons, the federal case law on which Amicus relies addressing induced impacts is inapposite. As a foundational matter, SEPA is meaningfully different than the

National Environmental Policy Act ("NEPA") on the issue of economic analysis. As noted by the Board, SEPA expressly excuses EISs from having to analyze economic competition and specifies that economic analyses are not grounds for determining EIS adequacy. AR15668 (citing WAC 197-11-448(3)). Due to these distinctions between SEPA and NEPA, the cases to which Appellants cite are legally irrelevant. *See, e.g.*, *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 68-69, 510 P.2d 1140, *review denied sub nom. State v. Silverthorn*, 83 Wn.2d 1001 (1973); *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 280, 525 P.2d 774 (1974); *ASARCO Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 709, 601 P.2d 501 (1979).

The cases are also factually distinguishable. Amicus has made no showing that the markets affected by the specific proposals in those cases are at all similar to those at issue here, and they are not. For example, *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003),

involved a NEPA challenge to a rail line project that would provide a shorter and less expensive way to transport coal from mines to power plants. In that case, the EIS "wholly failed to consider the effects on air quality that an increase in the supply of low-sulfur coal to power plants would produce." *Id.* at 548. The Court concluded that was deficient because it was "almost certainly true" that the project would increase the long-term demand for coal and any resulting adverse effects. *Id.* at 549. The SEIS for TLNG examined the impacts of combustion of LNG by all end uses, including vessels—it did not "wholly fail" to consider those emissions. Moreover, TLNG will allow large ocean-going vessels to supplant their use of MGO with LNG and PSE's experts, which PCHB credited, testified that assuming a 1:1 displacement for LNG and MGO was both reasonable and common practice. AR15666-69, 27133, 27152, 27156, 27170, 27233-35; Tr. 644:24-645:5.

Similarly, *WildEarth Guardians v. Bureau of Land Management*, 870 F.3d 1222 (10th Cir. 2017), is inapposite.

That case involved an EIS containing a blanket assertion without any supporting data that coal would be substituted from other sources. As noted by the Board, "Contrary to the facts in *WildEarth*, the [TLNG] SEIS explained why the LCA used a 1-for-1 displacement assumption" and "Unnasch, Couch, and Dr. Levy also provided expert testimony on the reasonableness of using a 1-for-1 assumption in the LCA." AR15668. The cases Amicus cites are inapplicable and do not command a different outcome.

F. The SEIS Properly Declined to Speculate About Future Marine Fuel Technologies and Therefore Avoided Uncertainty.

Amicus advances many of the same arguments ACT makes on the uncertainty of the future marine fuels markets, and its arguments fail for the same reasons ACT's arguments fail. PSE Br. at Section IV.B. On the key issue advanced by Amicus related to disclosure of uncertainty, Amicus fails to confront the fatal flaw in its argument. Namely, there is no uncertainty precisely because the SEIS declined to add layers of speculative

uncertainty to its analysis. *Id.* The undisputed evidence before PCHB demonstrated that marine gas oil and LNG are the only currently viable fuel options for ocean-going vessels,[5] and witnesses for ACT and PSE agreed it is "impossible" to predict the future of the alternative marine fuels market over the life of the project, especially for large ocean-going vessels.[6] PSE Expert Jan Hagen Andersen testified that "current data and trends confirm that LNG will displace MGO if the LNG bunkering infrastructure is available," and that because other fuel alternatives such as batteries, hydrogen, and ammonia, are still under development and have feasibility constraints, particularly for large ocean-going vessels that will serve as TLNG's target customer, "a GHG displacement analysis of these alternative fuels as compared to LNG is even more uncertain because the

[5] *See* Tr. 893:7-23 (Andersen), 99:10-108:14 (Erickson), 151:15-23 (Pratt); AR211, 15671 ("Erickson and Dr. Pratt did not disagree with PSE witnesses that MGO and LNG are the only commercially available marine fuels.").
[6] *See* AR211 (Kaltenstein), 222, 27180-81 (Andersen), 27136-37; Tr. 78:5-79:2 (Couch), 140:10-15 (Pratt).

life cycle emissions of these alternatives over the next 40 years invites yet another layer of speculation." AR27180. He stated that, "in applying a 1:1 displacement assumption, PSCAA reasonably declined to speculate on" the future potential life-cycle emissions of alternative fuels. AR27187. Thus, Appellants' and Amicus's arguments invite speculation and uncertainty. The SEIS declined to engage in that speculation that would have created uncertainty. As a result, it avoided any need to disclose uncertainty related to the future fuels market. PCHB credited the testimony of PSE's witnesses. That credibility determination is not reviewable on appeal. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 421, 225 P.3d 448 (2010); *Hilltop Terrace Homeowner's Ass'n v. Island Cnty.*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995) (the substantial evidence standard "necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses") (citation omitted). PCHB's conclusion that the SEIS was reasonable is also entitled to deference and has support in the record.

V. CONCLUSION

For reasons stated herein and in PSE's Response Brief, this Court should affirm PCHB's order.

Respectfully submitted this 22nd day of August, 2022.

VAN NESS FELDMAN LLP

I certify that this Response to Amicus Brief contains 4,950 words in compliance with RAP 18.17(b).

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CERTIFICATE OF SERVICE

I, I'sha Willis, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as legal assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth below:

1. PSE's Response to Amicus Brief;
2. Certificate of Service;

and that on August 22, 2022, I caused the foregoing documents to be e-filed and e-served electronically through Washington State Appellate Courts' Secure Portal as follows:

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///

Dated this 22nd day of August, 2022.

s/ I'sha Willis
I'sha Willis, Declarant

VAN NESS FELDMAN LLP

August 22, 2022 - 4:03 PM

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